Mahkota Technologies Sdn Bhd (formerly known as The General Electric Company of Malaysia Sdn Bhd) v Kemajuan Amoy Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–22–796 OF 2001
ABDUL MALIK ISHAK J
18 APRIL 2003

Civil Procedure *— Preliminary objection — Whether court should rule on preliminary issue — Whether preliminary issue raised merely technical in nature — Whether court should proceed to hear merits of case*

This was an appeal filed by the defendant against the decision of the learned senior assistant registrar ('SAR') in allowing the plaintiff's summons in chambers which was an application by the plaintiff to reinstate the plaintiff's application for leave to enter summary judgment against the defendant. The summons in chambers was earlier struck out by the learned SAR because of the failure of the plaintiff's counsel to attend court on two occasions. At the outset, the defendant raised a preliminary objection that the summons in chambers was bad in law and ought to be dismissed with costs for non-compliance with Order 32, rule 1 and Form 62 of the Rules of the High Court, 1980 ('RHC') which makes it mandatory that the grounds of the application be stated and such non-compliance had occasioned a substantial miscarriage of justice.

Held, dismissing the preliminary objection and allowing the appeal:

(1) The courts are bound by the provisions that are incorporated in the RHC and legal practitioners are entitled to raise preliminary objections based on procedural technicalities. There is no provision in the RHC that says that the courts are bound to decide cases according to equity, good conscience and the merits of the case without regard to technicalities and to legal forms. On the facts, the court was of the view that the preliminary objection raised by the defendant was merely technical in nature and the court was entitled to overlook that preliminary objection and proceed to hear the merits of the case (see p 500B–E).

(2) The court will not entertain any adjournment, be it a stand down or otherwise, by any party and the court must expeditiously proceed to hear the case forthwith. A fortiori if the court is designated as a fast track court. The defendant would be prejudiced by the reinstatement of the summons in chambers because a summary judgment procedure would not allow a full blown trial to proceed where at that trial proper all the pertinent issues would be ventilated by the parties through their respective witnesses. Furthermore, the plaintiff's solicitors own conduct in not attending the High Court on both occasions as alluded showed that the plaintiff was disinterested in pursuing with its

summary judgment application (see p 502D–G); *Patani Metal Sdn Bhd v Lt Cdr (B) G Thygarajah* [2001] 5 MLJ 241 followed. A

[Bahasa Malaysia summary

Ini adalah satu rayuan defendan terhadap keputusan penolong kanan pendaftar yang bijaksana ('PKP') yang membenarkan saman dalam kamar plaintif yang telah menghidupkan semula permohonan plaintif untuk memohon agar penghakiman terus dimasukkan terhadap defendan. Saman dalam kamar tersebut telah terlebih dahulu dibatalkan oleh PKP yang bijaksana kerana kegagalan peguam plaintif untuk menghadiri mahkamah untuk dua kali. Pada permulaannya, defendan telah menimbulkan satu bantahan awal bahawa saman dalam kamar tersebut adalah tidak sah di sisi undang-undang dan patut ditolak dengan kos kerana ketidakpatuhan dengan A 32 r 1 dan Borang 62 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menjadikan ia mandatori bahawa alasan-alasan permohonan tersebut dinyatakan dan ketidakpatuhan sedemikian telah menyebabkan satu ketidakadilan yang substantif. B C D

Diputuskan, menolak bantahan awal dan membenarkan rayuan:

(1) Mahkamah terikat dengan peruntukan-peruntukan yang digubal dalam KMT dan pengamal-pengamal undang-undang berhak untuk menimbulkan bantahan-bantahan awal berdasarkan prosedur teknikal. Tiada peruntukan dalam KMT yang menyatakan bahawa mahkamah-mahkamah terikat kepada kes-kes yang telah diputuskan menurut ekuiti, minda yang baik dan merit kes tanpa mempedulikan teknikaliti dan borang undang-undang. Berdasarkan fakta-fakta, mahkamah berpendapat bahawa bantahan awal yang ditimbulkan oleh defendan hanya bersifat teknikal dan mahkamah berhak untuk tidak mempedulikan bantahan awal tersebut dan terus mendengar merit kes (lihat ms 500B–E). E F G

(2) Mahkamah tidak akan melayan apa-apa penangguhan, walaupun ia satu penangguhan sebentar atau sebaliknya, oleh mana-mana pihak dan mahkamah perlu dengan segera untuk terus mendengar kes tersebut. A fortiori jika mahkamah dilantik sebagai satu mahkamah fast track. Defendan akan diprejudiskan oleh penghidupan semula saman dalam kamar tersebut kerana satu prosedur penghakiman terus tidak akan membenarkan satu perbicaraan yang telah dimulakan untuk diteruskan di mana semasa perbicaraan sebenar semua persoalan-persoalan yang penting akan disuarakan oleh pihak-pihak melalui saksi-saksi masing-masing. Tambahan pula, perbuatan peguamcara-peguamcara plaintif sendiri yang tidak menghadiri Mahkamah Tinggi pada kedua-dua masa tersebut sebagaimana yang disebutkan menunjukkan bahawa plaintif tidak berminat untuk H I

meneruskan permohonan penghakiman terusnya (lihat ms 502D–G); *Patani Metal Sdn Bhd v Lt Cdr (B) G Thygarajah* [2001] 5 MLJ 241 diikut.]

Notes

For cases on application for adjournment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 168–179.

For cases on whether court should rule on preliminary issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4922–4923.

Cases referred to

Beauford Baru Sdn Bhd v Gopala Krishnan VK Gopalan [2002] 6 MLJ 134 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 2 MLJ 331 (refd)

Capital Insurance Bhd v Aisah bte Abdul Manap & Anor [2000] 4 MLJ 65 (refd)

Fulcrum Capital Sdn Bhd v Dato Samsudin Abu & Ors [2001] MLJU 744 (refd)

Lam Kong Co Ltd v Thong Guan Co Pte Ltd [2000] 4 MLJ 1 (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385 (refd)

Patani Metal Sdn Bhd v Lt Cdr (B) G Thygarajah [2001] 5 MLJ 241 (folld)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Legislation referred to

Rules of the High Court 1980 O 1A, O 32 r 1

Rules of the Court of Appeal (Amendment) 2002 (PU (A) 196/2002) r 3A

Rules of the High Court (Amendment) 2002 6(PU (A) 197/2002) O 2 r 3

Adrian Oswald (*Elizabeth Teh* with him) (*Sarbjit & Co*) for the plaintiff.
Sharon Sidhu (*BS Sidhu & Co*) for the defendant.

Abdul Malik Ishak J:

Introduction

This was an appeal filed by the defendant to the judge in chambers as seen in encl 17 against the decision of the learned senior assistant registrar ('SAR') in allowing the plaintiff's summons in chambers dated 4 June 2002 (encl 14) which was an application by the plaintiff to reinstate the plaintiff's application for leave to enter summary judgment against the defendant as seen in encl 8.

Preliminary objection

Miss Sharon Sidhu, the learned counsel for the defendant, at the outset raised a preliminary objection as contained in her letter dated 12 July 2002 which was phrased and framed in this manner:

> We hereby give you notice that we shall on the date of hearing of the abovementioned summons in chambers (referring to encl 14) raise a preliminary objection that the said application is bad in law and ought to be dismissed with costs for non-compliance with O 32 r 1 and Form 62 of the Rules of the High Court 1980 ('RHC') which makes it mandatory that the grounds of the application be stated and such non-compliance has occasioned a substantial miscarriage of justice.

Her preliminary objection was aimed at the summons in chambers in encl 14 which as phrased constituted, according to her, a serious non-compliance with O 32 r 1 of the Rules of the High Court 1980 ('the RHC') for not specifying the grounds of the application. In its original text, encl 14 was worded in this way:

> 1) Saman dalam kamar dan afidavit sokongan yang diikrarkan oleh Tan Loon Leong pada 8 Februari 2002 yang difailkan pada 9 Februari 2002 di dalam tindakan ini yang dibatalkan pada 20 Mei 2002 kerana ketidakhadiran peguam plaintif dihidupkan kembali.
>
> Alasan permohonan ini terkandung dalam afidavit Rezalman bin Bahran yang diikrarkan dan difailkan bersama ini.

and one can certainly appreciate her chagrin at the way encl 14 was worded. Incidentally, the affidavit in support that was affirmed by Tan Loon Leong on 8 February 2002 and filed on 9 February 2002 can be seen in encl 7.

She cited the decision of Mohd Hishamudin J in the case of *Chellappa a/l Kalimuthu v Sime UEP Properties Bhd & Ors* [2002] 2 MLJ 209, where his Lordship in upholding the preliminary objection and dismissing the plaintiff's application there said (at p 209 of the report under Held (1)):

> (1) It was imperative that the grounds for the application be stated in the summons in chambers. The word 'must' was used in O 32 r 1 of the RHC and Form 62 stipulated the requirement in clear terms by the presence of the words 'the grounds of the application are (state the grounds) ...' in the said form. As such, the grounds were an important and essential part of the summons as prescribed by O 32 r 1 and Form 62. Without stating the grounds in the summons in chambers, there had been a serious non-compliance with O 32 r 1 of the RHC (see p 213D–F).

She then strenuously submitted that the preliminary objection was not in the nature of a mere technical objection but rather it was founded and struck at the very substance of the plaintiff's application. According to her, the plaintiff's non-compliance had caused a substantial miscarriage of justice to the defendant. She listed the prejudice that had been occasioned to the defendant in these words:

(1) that the defendant had no notice of the grounds which the plaintiff had relied upon;

A (2) that the plaintiff had taken the defendant by surprise by referring to matters that were not within the four corners of the application in encl 14; and

(3) that the plaintiff had not stated which rule of the court which the plaintiff was relying upon as the empowering and enabling provision which this court could exercise its jurisdiction and discretion to re-instate the plaintiff's summons in chambers in encl 8.

Mr Adrian Oswald, the learned counsel for the plaintiff, submitted that the non-compliance with O 32 r 1 of the RHC as seen in encl 14 could not be held as the sole basis for striking out encl 14 without considering the merits of encl 14 itself. That non-compliance was said not to have prejudiced the defendant in any way nor had it occasioned a substantial miscarriage of justice to the defendant. He cited the following reasons:

(a) that the defendant had full knowledge and the defendant too ought to have reasonable knowledge of the plaintiff's grounds by reading the affidavit in support affirmed by Rezalman bin Bahran on 4 June 2002 as seen in encl 13; and

(b) that the defendant by filing an affidavit in reply affirmed by Lim Sue Beng on 11 July 2002 as seen in encl 15 had in a subtle manner suppressed the allegation of ignorance of the plaintiff's grounds of application in encl 14 because the matters as alluded to by the defendant in encl 15 clearly indicate that the defendant had understood and had reasonable knowledge of the plaintiffs grounds for its application in encl 14.

Multi-faceted preliminary objections are found in the law journals. I need to refer to some of them here. Thus, in the case of *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561, the Court of Appeal held that the respondent's preliminary objection that the appellant's notice of appeal was filed out of time was a mere technicality and should not be allowed. The Court of Appeal also held that a procedural and technical objection such as this should not be allowed to obstruct the process of giving justice to the deserving party by going into the substantive issues before the court.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 2 MLJ 331, the Federal Court was not concerned with the defect in the pleadings and proceeded to hold that 'the justice of the case should be the overriding consideration' and that the 'rules of court and of practice are created to facilitate the attainment of justice, not its obstruction' (per Gopal Sri Ram JCA at pp 342–343 of the report). In *Beauford Baru Sdn Bhd v Gopala Krishnan VK Gopalan* [2002] 6 MLJ 134, Low Hop Bing J after quoting in verbatim r 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU (A) 196/2002) and O 2 r 3 of the Rules of the High Court (Amendment) 2002 6 (PU (A) 197/2002), both of which came into force on 16 May 2002, aptly said at p 140 of the report:

> It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural

technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

Legal practitioners are fond of and adept at raising preliminary objections. And the courts are equally adept at deciding on these preliminary objections. The constitutional role of the court is to hear cases on its merits and not to dismiss those cases on mere technicalities. This is now recognized by our apex court — the Federal Court, in the case of *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385. But, the courts are bound by the provisions that are incorporated in the RHC and legal practitioners are entitled to raise preliminary objections based on procedural technicalities. There is no provision in the RHC that says that the courts are bound to decide cases according to equity, good conscience and the merits of the case without regard to technicalities and to legal forms. Seen in this context, Miss Sharon Sidhu was entitled, as of right, to raise the preliminary objection as reproduced earlier. Indeed, the courts in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and in *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 gave credence to preliminary objections.

It is part and parcel of my judgment that the preliminary objection raised by Miss Sharon Sidhu was merely technical in nature and this court was entitled to overlook that preliminary objection and proceed to hear the merits of the case in view of the recent amendment to the RHC in the form of O 1A. I must now reproduce that O 1A of the RHC:

ORDER 1A

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

And I have since given effect to this amendment in the case of *Khoo Yong Seng v Ng Choo Peng @ Ng Amoi & Anor* [2003] 5 CLJ 498, [2003] 2 CLJ 191 ([2002] MLJU 664).

Merits of the case

I will now proceed to examine the merits of the case.

The plaintiff's summons in chambers dated 4 June 2002 in encl 14 was in the nature of an application to reinstate the plaintiff's summons in chambers in encl 8 for leave to enter summary judgment against the defendant. But the summons in chambers in encl 8 was struck out by the learned SAR on 20 May 2002 because of the failure of the plaintiff's counsel to attend court on two occasions, namely:

(a) on 23 April 2002 when the summons in chambers in encl 8 was fixed for hearing; and

(b) on 20 May 2002 when the case was called up for mention at 9.50am.

A It must be borne in mind that the plaintiff's solicitors were duly informed about these two dates by and through a letter dated 25 March 2002 from the High Court at Wisma Denmark emanating from the pen of Madam Madihah bte Harullah, the hardworking deputy registrar of the High Court, as seen in exhibit marked as 'LSB-1' annexed to the affidavit of reply affirmed by Lim Sue Beng as seen in encl 15. Another letter dated 23 April B 2002 was from the law firm of Messrs BS Sidhu & Co — the solicitors for the defendant, as seen in exhibit marked as 'LSB-2' annexed to the affidavit of reply affirmed by Lim Sue Beng as reflected in encl 15.

It must also be borne in mind that the plaintiff provided no explanation for the absence of its counsel in court on 23 April 2002. This was certainly C a discourteous act on the part of the plaintiff's counsel. In regard to the absence of the plaintiff's counsel in court on 20 May 2002, it was sought to explain that the plaintiff's counsel chose to attend the Sessions Court at Ampang on that day instead of attending the High Court at Wisma Denmark. It was said that there were two matters at the Sessions Court at Ampang and once those matters were over, the plaintiff's counsel D immediately contacted the High Court at Wisma Denmark by telephone to stand down the matter for a while in order to enable the plaintiff's counsel to attend to the proceeding at the High Court at Wisma Denmark. But, it was said that the court clerk of the High Court at Wisma Denmark informed the plaintiff's counsel that the application in encl 8 had been struck out by the learned SAR at 9.50am. This prompted the plaintiff's counsel to file the E summons in chambers in encl 14 to reinstate the application in encl 8. It was said that after hearing the submissions of counsel on both sides in regard to the summons in chambers for reinstatement of encl 8 as found and phrased according to encl 14 — the not so happily worded application that was reproduced in the early part of this judgment, the learned SAR had on F 15 July 2002 allowed the plaintiff's summons in chambers application in encl 14. In short, the learned SAR allowed encl 8 to be re-instated. This meant that the plaintiff was now free as a bird, so to speak, to proceed with its avowed intention of obtaining summary judgment against the defendant under O 14 of the RHC.

The defendant was certainly not happy with the decision of the learned G SAR in allowing encl 14 and thereby re-instating encl 8. It was for this reason that the defendant filed an appeal in encl 17 to the judge in chambers.

In my judgment, it was abundantly clear the plaintiff's solicitors had full knowledge that encl 8 was fixed for hearing on 23 April 2002 and subsequently for mention on 20 May 2002 and yet the plaintiff's solicitors H saw it fit not to attend the High Court at Wisma Denmark on both occasions. It was an excellent display of utter disregard to the High Court at Wisma Denmark on both occasions. Not a single reason was advanced for the absence of the plaintiff's solicitors on 23 April 2002. The reasons advanced for the absence of the plaintiff's solicitors on 20 May 2002 were unacceptable. The plaintiff's solicitors preferred a court of subordinate I jurisdiction as opposed to a court of superior jurisdiction — in this case the High Court at Wisma Denmark. Moreover, the request over the telephone came too late in the day. That telephone call to the court clerk of the High

Court at Wisma Denmark was made after the plaintiff's solicitors had completed the two matters in the Sessions Court at Ampang and after the learned SAR had struck out encl 8 at 9.50am. A

Telephoning the court clerk of the High Court at Wisma Denmark to ask for a stand down will not be condoned by this court especially under the factual matrix of the present case. There was clear preference to the two matters at the Sessions Court at Ampang as opposed to the High Court matter in encl 8 at Wisma Denmark. That telephone call too was definitely made to the High Court at Wisma Denmark after 9.50am on that fateful day. By that time, encl 8 had been struck out by the learned SAR. B

Just like Zaleha Zahari J in *Patani Metal Sdn Bhd v Lt Cdr (B) G Thygarajah* [2001] 5 MLJ 241 who relied on the former honorable Chief Justice's Circular vide KHN No 47 of 2000 dated 10 April 2000 which stipulated, inter alia, that no adjournment should be entertained by reason of counsel being engaged in another court, including that of the Federal Court, I too applied the same circular by the former honourable Chief Justice of Malaysia in the case of *Fulcrum Capital Sdn Bhd v Dato Samsudin Abu Hassan (Rahaz Sdn Bhd & Anor, interveners) and another application* [2001] 1 AMR 875, at p 969 at paras 25–30 ([2001] MLJU 744). The same case was also reported in another popular local law journal vide [2001] 5 CLJ 73. C D

The upshot of it all would be this. The court will not entertain any adjournment, be it a stand down or otherwise, by any party and that the court must expeditiously proceed to hear the case forthwith. A fortiori if the court is designated as a fast track court, like my court. E

At any rate, it must be borne in mind that the summons in chambers in encl 8 as framed and phrased was merely an application for summary judgment filed by the plaintiff and as such the striking out of encl 8 by the learned SAR on 20 May 2002 would cause no prejudice to the plaintiff since the plaintiff would still be entitled to a full trial of the whole action with the benefit of calling all the relevant witnesses. On the other hand, the defendant would be prejudiced by the reinstatement of the summons in chambers in encl 8 because a summary judgment procedure would not allow a full blown trial to proceed where at that trial proper all the pertinent issues would be ventilated by the parties through their respective witnesses. F G

Furthermore, it is germane to mention that through the plaintiff's solicitors own conduct in not attending the High Court at Wisma Denmark on both occasions as alluded to earlier show that the plaintiff was disinterested in pursuing with its summary judgment application in encl 8. H

For the reasons as adumbrated above, I must allow the appeal in encl 17 with costs here and before the learned SAR.

Preliminary objection dismissed and appeal allowed.

Reported by Peter Ling I